United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Affidavit

76-6075

To be argued by
MICHAEL H. DOLINGER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6075

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P/S

NATURAL RESOURCES DEFENSE COUNCIL, INC.; NEW YORK ASSOCIATION FOR BRAIN INJURED CHILDREN; CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ENVIRONMENTAL ACTION COALITION; FRIENDS OF THE EARTH; HIGHWAY ACTION COALITION; NATIONAL WELFARE RIGHTS ORGANIZATION,

Plaintiffs-Appellees,

—v.—

RUSSELL TRAIN, as Administrator of the U.S. Environmental Protection Agency; and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS

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—v.—

RUSSELL TRAIN, as Administrator of the U.S. Environmental Protection Agency; and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

Issue Presented for Review

Whether the District Court erred in holding that, under the Clear Air Amendments of 1970, once the Administrator of the Environmental Protection Agency has determined that an airborne substance has an adverse effect on public health and welfare and that its presence in the ambient air results from numerous or diverse mobile or stationary sources, it must be placed on

a list of air pollutants for which air quality criteria and national ambient air standards must be issued and state implementation plans developed.

Statement of the Case

(a) The Proceedings Below

The Environmental Protection Agency ("EPA") and its Administrator, Russell Train, (collectively "defendants") appeal from an order of the United States District Court (Stewart, *J.*) requiring the Administrator, within thirty days, to place lead on a list of air pollutants maintained under Section 108(a)(1) of the Clear Air Act as amended, 42 U.S.C. § 1857c-3(a)(1) ("the Act").* The effect of the order is first to require the EPA to develop "air quality criteria" and "national ambient air standards" for lead within a statutorily prescribed time period and then to compel all states to submit implementation plans to the EPA to meet the standards issued.

The order of the District Court was entered pursuant to a memorandum opinion dated March 1, 1976, which granted plaintiffs' motion for summary judgment and denied defendants' motion to dismiss or for summary judgment (A. 3-15).

Defendants filed a timely Notice of Appeal on April 29, 1976, and have been granted an expedited appeal schedule. Jurisdiction is conferred on this Court by 28 U.S.C. § 1291.

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* In compliance with the court order, on March 31, 1976 the Administrator listed lead under Section 108. 41 Fed. Reg. 14921 (1970).

(b) Statement of Facts

The Clean Air Act

The 1967 Act

In 1970, Congress enacted certain amendments P.L. 91-604, to the Clean Air Act of 1963,* as amended in 1967 ("the 1967 Act"). Under the 1967 Act, the Secretary of Health, Education and Welfare was authorized to direct a cooperative federal and state program "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; . . ." Sec. 101(b)(1).** This effort included direction of a national research and development program, assistance to state and local governments in developing of air pollution prosecution and control programs, and encouragement of regional control programs. Sec. 101(b)(2)-(4).

As for actual regulation of pollutant concentrations in the ambient air, the 1967 Act gave the Secretary discretion to develop "such criteria of air quality as in his judgment may be required for the protection of the public health and welfare. . . ." Sec. 107(b)(1). These criteria were to be, in essence, descriptions of the effects on health and welfare to be expected from the presence of various concentrations of the pollutant. If the Secretary issued criteria for a particular air pollutant, the individual states could, on their own, develop air quality standards for that pollutant and an implementation plan to achieve those standards and submit the standards and plan for approval by the Secretary. Sec. 108(c)(1). If the State did not submit such standards and an implementation plan,

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* P.L. 88-206, 77 Stat. 392.

** The 1967 Act, P.L. 90-148, 90 Stat. 148 is set forth in full at pages 68-129 of the Senate Committee Report on the 1970 amendments. S. Rep. No. 1196, 91st Cong, 2d Sess. (1970).

the Secretary was permitted to issue standards for the state if he "found it necessary to achieve the purpose of The Act." Sec. 108(c)(2).*

The 1970 Amendments

The 1970 Clean Air Amendments were enacted to speed the process of reducing and ultimately eliminating air pollution on a national scale. This was done principally by augmenting the number of alternative control strategies available to the federal overseer of the anti-pollution effort—in 1970 this task was reassigned from the Secretary of Health, Education and Welfare to the Administrator of the EPA—and by placing time limits on certain ongoing pollution control processes.

Alternative Strategies Available to the Administrator

In essence, the statute provided for two alternative types of approaches. First, under the "listing—criteria—state plan" approach retained from the 1967 Act, the states would regulate a pollutant if its total concentration in the ambient air** (regardless of source) exceeded an EPA standard. Second, the Amendments also

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*The 1967 Act also required the Secretary to establish standards for the emission from new vehicles of any substance that he believed might contribute to air pollution and to provide for testing of new motor vehicle engines to determine if they comply with such standards. Secs. 202 & 206. With respect to the fuel used in such engines, the Act authorized the Secretary to require registration and reporting as to the use of any fuel additives (such as lead) and required him to report to Congress on the desirability of establishing national standards on emission of pollutants from stationary sources as well as for aircraft engines. Secs. 210 & 211.

**40 C.F.R. § 50.1(e) defines "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access."

provided a variety of source controls, allowing regulation of the emission of pollutants from particular types of sources, regardless of the total concentration in the ambient air.

With respect to the first alternative, *i.e.*, state implementation of air quality standards for pollutants designated by the Secretary, the amendments made two basic changes from the 1967 Act—first, they withdrew from the states and gave the Administrator the sole power to issue standards; and, second, they set up a specific timetable for issuance of criteria, standards and implementation plans for pollutants designated for such treatment by the EPA.

To accomplish these changes the amendments specifically provided that thirty days after enactment the Administrator was to publish a list of all air pollutants (subject to later revision): (i) that "in his judgment" may have "an adverse effect on public health or welfare"; (ii) that come from "numerous or diverse mobile or stationary sources"; and (iii) "for which air quality criteria had not been issued before . . . enactment . . . but for which he plans to issue air quality criteria." Section 108(a)(1)(A)-(C), 42 U.S.C. § 1857c-3(a)(1).* Within twelve months after he has listed an air pollutant, the Administrator must issue air quality criteria and information on pollution control techniques together with proposed national ambient air quality standards for the pollutant. Secs. 108(a)(2), 108(b)(1) & 109(a)(2). Ninety days thereafter (to allow time for submission of written comments), he is required to adopt air quality standards for the pollutant—primary stand-

* The Clean Air Act, as amended, is set forth at 42 U.S.C. § 1857 et seq. For convenience, subsequent references to provisions of the Act will be to sections of the statute, rather than of the United States Code.

ards to set the acceptable level to protect public health and secondary standards to protect the public welfare.* Sec. 109(a)(2).

Nine months after the promulgation of air quality standards, each state is required to submit an implementation plan to achieve the standard set by the Administrator, and the Administrator is required to approve or disapprove within four months after submission. To be approved the state plan must provide for attainment of the primary standard within three years and the secondary standard "within a reasonable time. . . ." Sec. 110(a)(1) & (2).

Apart from the "listing—criteria—state plan" approach of Sections 108-110, which involves control based on total concentration of the pollutant in the ambient air, the 1970 amendments provided the Administrator with a broad array of methods for direct regulation of specific sources of air pollutants.

With respect to stationary sources, the Act now requires that the Administrator publish a list of categories of stationary sources and then promulgate regulations setting performance levels for new sources. Sec. 111(a) & (b). In addition, the states are required to submit plans which both establish standards for emissions from stationary sources of pollutants not included on the list under Section 108 and provide means for implementing such standards. Sec. 111(d).

Finally, the amendments empowered the Administrator to impose emission standards for hazardous air pollutants to which no ambient air quality standard

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* "Public welfare" refers to such conditions as the quality of soil and vegetation — matters that affect the quality of life without necessarily directly affecting people's health. *See* Sec. 109(b)(2).

under Section 108 is applicable. As under Section 108, "The Administrator shall, within 90 days after the date of enactment . . . publish (and from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard." Sec. 112(b)(1)(A). Within 90 days of listing, the Administrator must publish a proposed standard for the pollutant, and then 90 days later approve a final standard. This section permits the EPA to block new or modified sources of a pollutant which the Administrator believes would violate the standard.

As for mobile sources of air pollutants, the amendments retain the requirement that the Administrator prescribe emission standards for new vehicles, and the statute specifies particular standards and approaches for the treatment of certain pollutants (*i.e.*, carbon monoxide, hydrocarbons and oxides of nitrogen). Sec. 202.

In addition, the amendments expanded the Administrator's authority over the use of fuel additives by authorizing him to control or prohibit the manufacture or use of any motor vehicle fuel or fuel additive if any resultant emission products endanger public health or welfare or impair the performance of emission control devices in general use. Sec. 211.

EPA's Performance under the Statute

The EPA has viewed the Clean Air Amendments of 1970 as giving it a variety of different approaches to the control of air pollutants, with the choice of approach, insofar as discretion remains with the Administrator, dependent upon the nature of the particular pollutant.

In the case of lead, prior to the enactment of the 1970 amendments, the Secretary expected to use the listing approach to trigger promulgation of air

quality criteria, ambient air quality standards, and state implementation plans. Hearings on S. 3229, S. 3466, and S. 3546, before Subcomm. on Air and Water Pollution of Committee on Public Works, 91st Cong., 2d Sess. 345 (1970) ("Senate Hearings"). However, once the 1970 amendments, with their broader choice of pollutant control strategies, were enacted, the Administrator decided to deal with lead principally under Section 211 of the Act by regulating lead in gasoline. *See* Briefing Memorandum for the Administrator (A. 247-53).

The decision to regulate fuel lead emissions was based upon the Administrator's finding that, although their contribution to human blood lead levels cannot be measured with precision, such lead emissions have an important incremental effect on total lead exposure and absorption into the body. 38 Fed. Reg. 33734-41 (1973). (A. 108-115). Indeed, more than 90% of airborne lead results from gasoline additives in motor vehicles (A. 108). The reason for deciding on direct fuel emission regulations rather than the "listing-criteria-state plan" avenue was the desirability of uniform federally enforced standards to ensure effective administration and a more efficient division of labor between EPA and state enforcement agencies. Specifically, the Administrator found that (1) uniform standards would make compliance easier than a proliferation of state rules, (ii) federal controls at the refinery level (available under Section 211) would be more efficient than state or local regulation of distributors and retailers, and (iii) since the states were still attempting to implement the six ambient air quality standards already in effect, they should not be burdened, if possible, with another major regulatory task (A. 250).

The use of gasoline regulations to control lead was further indicated by two additional factors. First, under Section 202 Congress had required that all motor vehicles

produced after 1974 comply with emission requirements that could only be met through the use of unleaded fuel. Second, Section 211 had authorized the EPA to reduce fuel exhaust emissions endangering health. Since pre-1975 vehicles were not required to use unleaded gasoline, the only way to reduce lead emissions sufficiently to protect health would be by limiting the amount of lead in gasoline used by such older automobiles.

Thus, on February 23, 1972, the Administrator proposed regulations requiring general availability of unleaded gasoline by July 1, 1974 for vehicles with lead sensitive emission systems. In addition, the regulations provided for a phased four-year reduction in lead content of fuels for pre-1975 vehicles. 37 Fed. Reg. 3882-84. After hearings and comments on the proposed regulations, the EPA announced final regulations on January 10, 1973 requiring general availability of unleaded gasoline, 38 Fed. Reg. 1254, and reproposed regulations requiring a reduction in gasoline lead content, 38 Fed. Reg. 1258. The latter regulations were promulgated in final form on November 28, 1973. 38 Fed. Reg. 37734-41.* The purpose of these regulations was to effect a 60-65% reduction in lead emissions from gasoline lead additives by 1979. The Administrator also announced his intention to review progress in this regard every third year

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* The reason for the reproposal of the lead reduction regulations was that testimony at EPA hearings and comments received concerning the regulations had challenged EPA's assumptions as to the health effects of lead, particularly that 2 micrograms of airborne lead per cubic meter was an accurate measure of the maximum concentration of lead consistent with low human blood lead levels. As a result the Administrator had reopened the comment period to obtain information on the effects of airborne lead, 37 Fed. Reg. 11786-87 (1972); and the newly obtained information led to the rejection of earlier assumptions on health effects and formed the basis for the reproposed regulations. The principal factor in the modification of the regulations was the

[Footnote continued on following page]

beginning in 1977, and he reserved the right to stiffen the regulations further, if necessary.*

As for the remaining 10% of lead in the air—which is attributable to stationary sources—the EPA has invoked a variety of its available statutory powers. Lead from stationary sources, such as smelters, is emitted primarily in particulate form; thus regulation of particulates emitted from stationary sources will have the effect of controlling particulate lead. To this end, the EPA has promulgated national ambient air quality standards under Section 109 for particulate matter. 40 C.F.R. §§ 50.4-50.7.

In addition, federal particulate emissions standards for stationary sources have been issued under Section 111 for new or modified incinerators, steel plants, and secondary lead smelters, all of which emit lead as a particulate. 40 C.F.R. §§ 60.52, 60.142, 60.162, 60.172, and 60.182. Moreover, ongoing research into the nature of industrial lead emissions may result in federal emis-

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Administrator's determination that it was difficult, if not impossible, to identify a precise threshold level of airborne lead as the basis for a control strategy and that the aggregate effect of all sources of human lead exposure had to be considered in defining such a strategy. *See* 38 Fed. Reg. 33734 (A. 108).

* The actual implementation of these regulations has been delayed by a series of petitions for review filed in the District of Columbia Court of Appeals by four lead additive manufactures, the National Petroleum Refiners Association, and the Natural Resources Defense Council. Initially, the Court of Appeals enjoined enforcement of the regulations. *Ethyl Corp.* v. *EPA*, — F.2d —, 7 ERC 1353 (D.C. Cir. 1975). This was reversed by the Court *en banc* on March 19 of this year (after the District Court's decision in this case), 8 ERC 1785, and certiorari was denied in June. 44 U.S.L.W. 3715 (U.S. June 18, 1976). As a result, the regulations will only go into effect this year.

sions standards under Section 111 specifically directed at the pollutant lead.*

The Course Of this Litigation

Plaintiffs brought this action in October 1974 pursuant to Section 304 of the Act, as well as 28 U.S.C. § 1361 and the Administrative Procedure Act, to require the Administrator to place lead on a list of air pollutants under Section 108 of the Act and to develop, on an expedited basis, air quality criteria and ambient air quality standards pursuant to Sections 108 and 109, thus triggering the drafting and submission of state implementation plans. Plaintiffs asserted that Section 108(a)(1) requires the listing of all air pollutants that the Administrator determines meet the tests of subsections 108(a)(1)(A) and (B) and for which criteria had not been issued prior to the passage of the 1970 amendments. Alternatively, plaintiffs argued that lead not only met the requirements of subsections 108(a)(1)(A) and (B), but also was required to be listed because section 108(a)(1)(C) incorporated by reference the intention of the Secretary of Health, Education and Welfare—as expressed to Congressional committees considering the 1970 amendments—to issue criteria for several substances, including lead.

Based upon this interpretation of the Act, plaintiffs moved for summary judgment in November 1974; defendants cross-moved for dismissal or summary judgment, contending that listing is discretionary. Due in part to the ongoing litigation in the Court of Appeals for the District of Columbia concerning EPA's gasoline lead regulations, a decision in this action was not rendered until March 1, 1976.

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* Research contracts will be concluded this summer for study of lead emissions from the gasoline additive manufacturing industry and the lead acid storage battery manufacturing industry. In addition, a study of the problem of fugitive (non-stack) emissions from lead emitting sources will be completed in August.

Statute Involved

CLEAN AIR ACT (as amended 1970)

Section 108(a)(1) & (2), 42 U.S.C. § 1857c-3(a)(1) & (2).

§ 1857c-3. Air quality criteria and control techniques —Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in com-

bination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * *

Section 109(a) & (b), 42 U.S.C. § 1857c-4(a) & (b)

§ 1857c-4. National primary and secondary ambient air quality standards; promulgation; procedure

(a) (1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in para-

graph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in same manner as promulgated.

Section 110(a)(1) & (2), 42 U.S.C. § 1857c-5(a)(1) & (2)

§ 1857c-5. State implementation plans for national primary and secondary ambient air quality standards—Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof)

within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. . . .

ARGUMENT

The District Court erred in holding that Section 108(a)(1) of the Clean Air Act requires the Administrator of the EPA to list a substance once he has determined that it has an adverse effect on public health and welfare and that its presence in the ambient air results from numerous or diverse mobile or stationary sources.

Introduction

The District Court held that Section 108 of the Clean Air Act requires that the Administrator list lead since (i) he had determined that it was harmful to public health and welfare * and (ii) it comes from numerous or diverse mobile or stationary sources; in short, the Court concluded that findings pursuant to section 108(a)(1)(A) and (B) deprive the Administrator of any discretion as to whether to use the listing procedure, with its attendant required development of air quality criteria, national standards and state implementation plans. In reaching this conclusion, the District Court invoked the language of Section 108, the legislative history of the 1970 amendments, and the structure of the Act as a whole.

In fact, however, the plain language of Section 108(a)(1) provides the Administrator with discretion as to whether to use the listing procedure for any air pollutant. To arrive at a different result, the lower court was obliged to treat one clause of section 108(a)(1)(C) as pure surplusage. Furthermore, the general structure of the

* Although the Administrator has not made a formal determination that airborne lead has an adverse effect on public health or welfare, he has conceded this to be the case for purposes of this litigation.

Act supports the EPA's view of its obligations and powers under Section 108. Finally, the legislative history of the 1970 amendments, cited by the District Court to support its interpretation, is at best ambiguous and certainly does not suffice to overcome the unambiguous statement of the statute itself; and Congressional action since the passage of these amendments supports EPA's position.

Plain Meaning of Section 108(a)(1)

Section 108(a)(1) provides:

> "For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
>
> "(A) which in his judgment has an adverse effect on public health or welfare;
>
> "(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> "(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section."

Thus, the amendments set out three tests that must be met before the Administrator is required to list a pollutant for which no criteria had been previously issued: (i) the Administrator must make the judgment that the air pollutant has an adverse effect on public health or welfare; (ii) that pollutant's presence in the ambient air must result from numerous or diverse mobile or stationary sources; and (iii), the Administrator must *plan to issue* air quality criteria under this section.

It is conceded that lead is dangerous to public health and welfare * and results from numerous or diverse mobile or stationary sources. But the third test—that the substance is one for which the Administrator plans to issue criteria—necessarily means that listing depends upon whether the Administrator decides to invoke the "criteria-standards-implementation plan" approach of sections 108-110.

In rejecting this obvious conclusion, the District Court contended that the clause "but for which he plans to issue air quality criteria" means simply that the pollutant is dangerous to health and welfare and comes from numerous or diverse sources, *i.e.*, that it meets the tests of section 108(a)(1)(A) and (B). (A. 8).

This cannot be. In the first place, such an interpretation simply does not comport with the language of section 108(a)(1)(C), which refers to "plans" of the Administrator. In the second place, the District Court's version would make the final clause of section 108(a)(1)(C) entirely superfluous since precisely the same meaning would be conveyed if the clause were deleted—that is, that the Administrator "shall" list all pollutants meeting subparagraphs A and B and for which no criteria had been issued prior to enactment of the 1970 amendments.

In thus effectively reading the last clause of Section 108(a)(1)(C) out of the Act, the District Court's attempted construction runs afoul of the well-settled rule that statutory language shall not be interpreted in such a manner as would render part of it surplusage.** *See,*

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* See footnote at page 16, *supra*.

** The District Court does qualify its interpretation of the last clause of sub-paragraph (C) by limiting its application to the initial list, to be issued 30 days after enactment (A. 8). But this does not save the analysis. First, there is no support in the statute for such a limited application of the language. And second, it would still make the last clause superfluous.

e.g., McDonald v. *Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932); *Ex Parte Public Nat'l Bank*, 278 U.S. 101, 104 (1928); *United States* v. *Blasius*, 397 F.2d 203, 206 & n.9 (2d Cir. 1968), *cert. denied*, 393 U.S. 1008 (1969).* Since the law presumes that Congress intended to convey some meaning by that clause and since the plain meaning of the section does not support the District Court's interpretation of it, that interpretation cannot stand.**

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* The District Court correctly noted that there is no authority that has directly confronted this question. The two cases it cites for their dicta, *Indiana & Michigan Elect. Co.* v. *EPA*, 509 F.2d, 839, 841 (7th Cir. 1975), and *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846, 847 (D.C. Cir. 1972), dealt only in passing with the issue of the Administrator's discretion to list a substance under section 108. Furthermore, the Court failed to mention the characterization of section 108 in *St. Joe Mineral Corp.* v. *EPA*, 508 F.2d 743, 744 n.3 (3d Cir. 1975), in which the Court (per Adams, J.) set out all three prerequisites to the listing of a pollutant, stating that the Administrator is required to list those pollutants which

> "in the Administrator's opinion (1) detracted from the public health or welfare; (2) originated from numerous sources; and (3) *merited controls.*" (Emphasis added.)

See also Hancock v. *Train*, — U.S. —, 96 S. Ct. 2006, 2008 n.5 (1976).

** An alternative interpretation, advanced below by plaintiffs but rejected by the District Court, should fare no better. According to this view, the clause "but for which he plans to issue air quality criteria" incorporates by reference the intention of the Secretary of Health, Education and Welfare, as reported to the Senate Committee in a memorandum during the course of hearings on the 1970 amendments, to issue criteria for several pollutants, including lead. See Senate Hearings, *supra*, at 345.

But if the Congress intended to require the listing of a specified number of previously identified pollutants, presumably it would have listed them and specifically required such action. Indeed, where Congress did wish to require specific action on particular pollutants, it did so specify: in section 202 of the Act it described in some detail the treatment to be given carbon monoxide, hydrocarbons, and oxides of nitrogen. Moreover, even if Congress had for some reason, chosen not to specify the pollutants on which it was inferentially requiring action, it would

[Footnote continued on following page]

The District Court itself admitted that if:

> "the language of § 108(a)(1)(C) 'for which . . . [the Administrator] plans to issue air quality criteria' is a separate and third criterion to be met before § 108 requires placing a pollutant on the list [then it follows that this] construction of § 108(a) leaves the initial decision to list a pollutant within the sole discretion of the Administrator." (A. 5).

That language is in fact a separate and third criterion to be met, and the decision to list a pollutant is therefore within the discretion of the Administrator.

The above interpretation is further supported by the opening language of section 108, which qualifies the requirement that the Administrator "shall list each pollutant" with the phrase "[f]or the purpose of establishing national primary and secondary ambient air quality standards". According to this plain language the intent of the Administrator, when listing a pollutant, must be to establish national ambient air standards. Therefore the Administrator's decision to control a pollutant by national ambient air standards, a decision based upon his conclusion that such standards are possible and desirable, must precede and form the purpose of that pollutant's listing.

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still have had to identify in the statute what "plans" it was referring to: for example, by requiring listing of "all pollutants specified in the memorandum of the Secretary of Health, Education and Welfare to the Senate Committee." Finally, the statute refers to plans of the *EPA Administrator*, whereas the plans mentioned to the Committee and relied upon by the plaintiffs were those of the *Secretary*. It would be extraordinary indeed for the Congress, by indirection, to bind one agency to the prior plans of another agency without even saying that this is what it was doing.

The Structure of the Act

Not only does section 108(a)(1) on its face support the EPA's construction of it, but the Act, considered as a whole, further evidences the intention of Congress to give the Administrator the discretion to choose which control strategies to invoke against specific pollutants.

The Act enables the EPA to impose direct federal controls on the emission of pollutants based upon their coming from stationary sources. Secs. 111, 112. And it empowers the EPA to impose controls based upon their coming from mobile sources. Secs. 202, 211, 231. Moreover, Congress specifically anticipated that those provisions could be used instead of the procedures under Section 108-110. For example, Section 112 provides means to control hazardous pollutants for which no ambient standards have been established, but "which in the judgment of the Administrator may . . . contribute to . . . serious illness." Sec. 112(a)(1). Similarly, Section 111(d) requires the states to implement new source performance standards for existing stationary sources when no ambient air quality standards exist.*

Clearly, then, Congress has made available to the Administrator a broad array of strategies for control of air pollution and has given him—as it must—the requisite discretion to choose from among them the appropriate

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* It should also be noted that Section 112(b)(1)(A), which unquestionably gives the Administrator discretion whether or not to deal with pollutants under its terms, is worded in strikingly similar language to Section 108(a)(1):

> "The Administrator shall ... publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section."

This parallel language in an indisputably discretionary context strongly militates against the argument that the wording of Section 108(a)(1)(C) denies discretion to the Administrator.

[Footnote continued on following page]

approach for each pollutant.* As another Circuit Court has observed, "Congress lodged with EPA, not the Courts, the discretion to choose among alternative strategies." *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 655 (1st Cir. 1974).**

Finally, in answering EPA's argument that the Administrator was authorized to choose among regulatory approaches, the District Court placed heavy emphasis on the fact that listing a pollutant would not in itself limit the Administrator's discretion to choose means other than state implementation plans for regulating lead (A. 11-12). In essence, the Court reasoned that even if the Administrator had to list lead and issue national ambient air quality standards, he could still regulate the pollutant by the other provisions of the Act (*e.g.*, fuel additive controls, gasoline emission requirements, stationary source regulations) and if those direct controls lowered the

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Indeed, when Congress wanted to impose a mandatory duty, it did so quite explicitly. Thus, sections 111, 202 and 231 are clearly written in mandatory terms, whereas sections 108, 112 and 211 use permissive language.

* Discretion to choose among alternatives does not necessarily mean discretion not to act, and, as the Statement of Facts, *supra*, makes clear, the Administrator has employed a variety of approaches to deal with lead pollution from all sources.

** This willingness of Congress to provide the Administrator with a variety of approaches for control of air pollutants and to permit him to choose among them makes eminent sense: the strategy of setting national ambient air quality standards (under Sections 108-110) is not appropriate for certain pollutants, of which lead is a principal example, since it may be virtually impossible, given the current state of scientific knowledge, to develop meaningful criteria and standards for such pollutants. The problem in the case of lead is that there are multiple sources of lead to which people are exposed, of which lead in the ambient air is only one. The major sources are food and water; others include dust contaminated with lead from automobiles exhausts, industrial sources, airborne lead and leaded paint. As a result, it has not yet been possible to develop a precise correlation between the concentration of lead in the air and levels of lead in the blood of

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amount of lead in the ambient air sufficiently to satisfy the promulgated standard, then the states would not have to carry out implementation plans.

This conclusion is in fact technically incorrect under the wording of section 110,* but more importantly it is beside the point. The fact that state implementation plans might, in special circumstances, be unnecessary, even if the pollutant is listed, does not contradict the evident Congressional intention to permit the EPA to decide whether criteria should be issued for particular pollutants.** It is clear from the Act itself and from the legislative reports that the triggering mechanism of listing under section 108 was viewed as part of one discrete strategy to deal with pollutants, *i.e.*, by use of state implementa-

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adults and children. Since the air quality criteria and standards to be issued under sections 108 and 109 depend upon such a correlation being made, their utility in the case of lead may be highly doubtful. *See* 38 Fed. Reg. 33734 (1973).

It may be noted in passing that the District Court also misconstrued section 108 if it assumed—as it may have (A. 12)—that collection of data about a pollutant occurs only after listing. In fact, such research and analysis is carried out before a pollutant is listed as it provides the basis for deciding whether listing and issuance of criteria and standards is the best control alternative. The decision to issue criteria and standards precedes listing. *Ethyl Corp.* v. *EPA*, — F.2d —, 8 ERC 1785, 1793 n.23 (D.C. Cir. 1976).

* If federal source controls lower the concentration of the air pollutant to the level prescribed by the air quality standards, presumably the state implementation plan could incorporate the federal regulations, but the states would still have to go through required procedures of rule making and public hearings. *See* 40 C.F.R. pt. 51.

** Indeed, such potential redundancy between federal source regulations and state implementation plans reinforces the view that the Administrator may choose between issuance of criteria and other approaches for control of pollutants.

tion plans regulating pollutant concentrations in the ambient air. *See* Conference Report No. 1783, 3 U.S. Code, Cong. & Admin. News 5377-78 (1970). There is no indication in either the statute or the legislative history that other available strategies, which provide for federal source controls, are to be subordinate to criteria and standards established after listing pursuant to sections 108 and 109. Since Congress intended to give the Administrator the choice of various strategies, it must be concluded that if he rejects the state implementation plan approach in favor of an alternative, he is not still bound to list the pollutant and establish air quality criteria and standards for the achievement of which state plans are not needed.

The Legislative History

Although the District Court invoked two fragments of the legislative history of the Clean Air Amendments in support of its conclusion, in fact the legislative history of those amendments, viewed as a whole, does not speak clearly to the issue, and certainly cannot overcome the clear intendment of the statute. *See, e.g., United States* v. *Oregon*, 366 U.S. 643, 648 (1961). "[T]he legislative history of a statute (particularly such relatively meagre and vague history as we have here) cannot radically affect its interpretation if the language of the statute is clear." *Calvert Cliffs' Coord. Comm.* v. *AEC*, 449 F.2d 1109, 1126 (D.C. Cir. 1971).

It must be borne in mind that the pre-existing Clean Air Act of 1963, as amended in 1967, vested in the Secretary of Health, Education and Welfare the discretion to determine whether to issue criteria for air pollutants, thus triggering the mechanism for the states to submit proposed clean air standards (or for the Secretary to do it in their stead) and for the drafting and approval of state implementation plans to meet those standards.

In amending the earlier statute, as the District Court correctly points out in quoting the House Report (A. 6), Congress was concerned with the pace and efficiency of efforts to eliminate air pollution. That concern was expressed in requirements for speedier action and in reorganization to give the national overseer a stronger hand in coordinating the antipollution campaign. Its expression did not involve depriving the federal regulatory agency of its prior discretion as to which modes of control should be used; rather, the new amendments added to the arsenal of weapons available to the Administrator and thus presupposed a substantial area of judgment as to which ones to use.

Indeed, the very House Report cited by the District Court clearly establishes that the House Committee's concern with federal performance did not induce it to recommend any limitation on the discretion of the agency in deciding whether to invoke the "criteria—standards—state implementation" approach. The only change recommended by the Committee with respect to the criteria procedures was to require the federal government itself to promulgate ambient air quality standards rather than leaving that task to the states. *See* House Report No. 1146, 3 U.S. Code, Cong. & Admin. News 5356-58, 5362 (1970).

The relevant sections of the bill as it finally emerged from conference adopted in large measure the Senate rather than the House version, but this meant only that the bill set a time deadline for issuance of criteria. (The House bill had not done so). *See* Conference Report No. 1783, 3 U.S. Code, Cong. & Admin. News 5376 (1970). The question of depriving the Secretary of his discretion to choose among alternative strategies appears not to have been mentioned during the Senate hearings and no reference to it is found in the Conference Report.

The one statement in the legislative reports which clearly supports plaintiffs' interpretation is a reference in the Senate Report to proposed section 109 (enacted, as modified, as section 108). This passage, which is cited by the District Court, reads as follows: "the agents on the initial list must include all those pollution agents or combinations of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile and stationary sources, and all those for which air quality criteria are planned." S. Rep. No. 1196, 91st Cong., 2d Sess. 54 (1970).

This characterization of the effect of section 109 of the Senate bill flies in the face of the statutory language that it purports to elucidate and for that reason alone should be rejected. *See, e.g. NLRB* v. *Plasterers' Union*, 404 U.S. 116, 129 n.24 (1971); *Marks* v. *Higgins*, 213 F.2d 884, 887 (2d Cir. 1954); *Warner* v. *Dworsky*, 194 F.2d 277, 279 (8th Cir.), *cert. denied*, 343 U.S. 968 (1953).

The interpretation suggested by the sentence in question would set up two categories of pollutants that must be listed—(i) those that are harmful to health and welfare and come from diverse mobile and stationary sources and (ii) those for which the Administrator plans to issue criteria. Presumably the latter would be an open-ended category with no limit on the Administrator's discretion to list pollutants, even if they did not meet the tests of section 108(a)(1)(A) and (B). But the effect of this construction would be to change the word "and" to "or" in section 108(a)(1)(B) and to add the word "and" to the tail-end of section 108(a)(1)(A). Moreover, the same sentence in the Report plainly errs when it refers to Section 108(a)(1)(B) as covering pollutants emitted from "mobile and stationary sources"; in fact, the provision

in question covers pollutants emitted from "mobile *or* stationary sources." These alterations in both the text and the meaning of the section are justified neither by the wording nor by the general purpose and legislative history of the Act. Indeed, not even plaintiffs or the District Court adopt this interpretation, and absent any compelling circumstances justifying a rejection of the plain meaning of the statute, neither should this Court. *See, e.g., Power Reactor Development Co.* v. *International Union of Elect., Radio & Mach. Workers*, 367 U.S. 396, 410 (1961).

On the whole, then, the most that can be said about the legislative history is that it demonstrates a concern by Congress to improve the government's air pollution control program but does not provide any convincing indication of a legislative intention to accomplish this end by eliminating the previous discretion of the environmental overseer to choose whether or not to issue ambient air criteria for pollutants. In view of the plain meaning of the provision actually enacted and the broad array of alternative means for controlling air pollutants, a contrary interpretation cannot be justified based upon the available evidence from the legislative proceedings.

Finally, Congress in the course of its oversight of the Clean Air Act has never questioned EPA's decision not to list lead under section 108. If Congress had intended to require listing of any of the pollutants mentioned in the 1970 legislative history, one would expect to find some query in the oversight hearings over the course of six years as to why such action had not yet been taken by EPA. *See, e.g., Administrator, FAA* v. *Robertson*, 522 U.S. 255, 267 (1975).

In fact, recent Congressional action on the proposed Clean Air Act Amendments of 1976 provides additional support for EPA's position. Section 101(a) of the pend-

ing House Bill, H.R. 10498, directs the Administrator to deal with each of four named pollutants * within a year after its passage, either by listing under section 108(a)(1), or by listing under section 112, or regulation under section 111 or by any combination of such actions; section 101(c) of the Bill directs the Administrator to consider revisions to the standards and criteria for oxides of nitrogen; and Section 101(d) directs the Administrator to conduct a study of the health and welfare effects of five named pollutants.**

Lead is notably absent from this list of pollutants about which Congress appears to be growing impatient, although other pollutants mentioned in the 1970 legislative history reappear in this section. In addition, the fact that Section 101(a) of the Bill allows the Administrator to choose among several strategies even while directing him to regulate certain pollutants shows Congressional recognition of the Administrator's discretion inherent in the Clean Air Act to choose among available control strategies. *Cf. Administrator, FAA* v. *Robertson, supra; Mattz* v. *Arnett*, 412 U.S. 481, 505 n. 25 (1973).

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* Vinyl chloride, cadmium, arsenic, and polycyclic organic matter.

** Sulfates, vinyl chloride, cadmium, arsenic, and polycyclic organic matter.

Conclusion

The Clean Air Act permits the Administrator to decide whether or not to list substances that meet the criteria of Sections 108(a)(1)(A) and (B), and gives him an array of alternative control strategies to apply to any given air pollutant. In holding that the defendant must list lead under Section 108, the District Court ignored the plain language and intendment of the 1970 amendments and instead offered an interpretation that is supported neither by the language of the section nor by the structure of the Act nor by the legislative history of the amendments. It is therefore respectfully requested that this Court reverse the decision of the District Court and direct that judgment be entered in favor of defendants.

Respectfully submitted,

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Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 19th day of July, 1976 she served two copys of the within Brief of Defts-Appellants

by placing the same in a properly postpaid franked envelope addressed:

David Schoenbrod, Esquire
15 West 44th Street
New York, New York 10036

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
19th day of July, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977